Supreme Court, U. S.
FILED
AUG 19 1980
MICHAEL RODAK, JR., CLERK

Nos. 79-1873, 79-6673, 79-6674 and 79-6688

In the Supreme Court of the United States

OCTOBER TERM, 1979

RICHARD LEWIS HERTHEL, PETITIONER
v.
UNITED STATES OF AMERICA

JAMES DOUGLAS HOLT, JR., PETITIONER
v.
UNITED STATES OF AMERICA

CHARLES DAVID JOHNSON, PETITIONER
v.
UNITED STATES OF AMERICA

WILLIAM JAMES AHLBRAND, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether petitioner Herthel (79-1873 Pet.) was improperly convicted of conducting an illegal gambling business in violation of 18 U.S.C. 1955 on the basis of his participation in the business as a bartender.

2. Whether the evidence was sufficient to sustain petitioner Ahlbrand's (79-6688 Pet.) conviction.

3. Whether the trial court abused its discretion in admitting the testimony of an FBI gambling expert (79-6673 Pet. only).

4. Whether the trial court erred by denying petitioner Johnson (79-6674 Pet.) a separate trial.

5. Whether examination of a witness at trial about her grand jury testimony inculpating petitioners violated the rule enunciated in *Bruton* v. *United States,* 391 U.S. 123 (1968). (79-6674 Pet. only).

6. Whether petitioners were entitled to a mistrial because the prosecutor reminded the jury in closing argument that the trial testimony of certain witnesses differed from the accounts they had given to the authorities prior to trial (79-6674 Pet. only).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a)[1] is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1980. The petition for a writ of certiorari in No. 79-1873 was filed on May 27, 1980; the petitions in Nos. 79-6673 and 79-6674 were filed on May 28, 1980. The petition in No. 79-6688 was filed on May 31, 1980, and is therefore out of time under former Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioners and two co-defendants[2] were convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955. Petitioners Johnson and Holt were sentenced respectively to terms of imprisonment of eighteen months and one year and one day. Petitioner Herthel was sentenced to a two year term of imprisonment, with all but 120 days suspended, to be followed by a five year term of probation. Petitioner Ahlbrand was sentenced to two years' imprisonment, with all but 30 days suspended, to be followed by a five year term of probation. The court of appeals affirmed (Pet. App. 1a-2a).

2. The evidence was that from about late July until late October 1977, petitioners and three co-defendants

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[1]"Pet. App." refers to the appendix to the petition in No. 79-1873.

[2]John C. Ahlbrand and Wilbert Hesch, Jr., were convicted along with petitioners. A third defendant, William J. Vandetti, was convicted after a separate trial.

operated an illegal gambling establishment on the second floor of a warehouse in Newport, Kentucky. Co-defendant John Ahlbrand, petitioner Ahlbrand's brother, was the president of a company, Quality Sales, Inc., located on the first floor of that warehouse (Tr. 645). The gambling establishment itself was equipped with a bar, a jukebox, cafe-style tables and chairs, a blackjack table and a poker table, and was open six days a week from approximately 1:00 a.m. to 7:00 a.m. (Tr. 34-35, 177, 205, 273-274, 605).

Petitioners had different roles in the establishment's operation. Petitioner Holt screened and sometimes searched prospective patrons at a door on the first floor of the warehouse, and then directed them to another door on the second floor where they would be admitted by co-defendants John Ahlbrand and Vandetti or petitioner Johnson (Tr. 125-126, 146, 204-205, 270-272, 282, 447-448). Co-defendants John Ahlbrand and Hesch served as blackjack dealers and petitioners Johnson and Ahlbrand as poker dealers (Tr. 129, 222, 274, 279, 449, 454-456, 528, 555-557). Petitioner Herthel tended bar and, along with John Ahlbrand and petitioner Johnson, supervised two waitresses who served drinks to players at the gambling tables (Tr. 125-126, 134-136, 223, 272, 282, 450).

Petitioners' "after-hours gambling joint" attracted nightly crowds ranging from 25 to 200 people (Tr. 127, 273, 282, 371, 449, 593). Each of the two gambling tables accommodated about nine players and was, as a rule, in continuous operation with people waiting to join the game (Tr. 273, 280, 283, 452, 458).

The blackjack game was conducted so that the odds heavily favored the "house" dealers over the other players (Tr. 395-400). The blackjack wagers generally ranged from $1 to $10, and 12 or more games (or "hands") were

played every hour (Tr. 280, 451). The house also provided poker dealers who, unlike blackjack dealers, did not actually play the game but instead merely dealt the cards. The poker dealers "cut the pot"—removed some of the money wagered at each of the several betting intervals during the course of a game—in order to guarantee a profit for the house (Tr. 276-277, 400-402, 455, 558, 578). Between $80 and $450 was wagered during a typical poker game (Tr. 278, 284, 458-459, 558).

Detective Michael Klein of the Commonwealth Attorney's Office staked out the Quality Sales, Inc. warehouse during the early morning hours nearly every weekend from July through early October 1977 (Tr. 618) On those occasions, he observed that the two to three block primarily residential area surrounding the warehouse was filled with parked cars and that a steady stream of people entered and left the warehouse (Tr. 605, 617-620). On several occasions Klein saw petitioner Holt standing at the warehouse entrance (Tr. 621).

In addition, Kentucky State Police Officer Don Groth and Commonwealth Attorney's Office investigator Thomas Beiting posed as customers at petitioners' gambling establishment. Beiting went there for the first time on August 4, 1977. He was searched at the door by petitioner Holt and then permitted to join a crowd of over 100 people on the second floor (Tr. 269-270). Petitioner Herthel was tending bar that night, petitioners Johnson and Ahlbrand were dealing poker, and players were waiting for spots at the blackjack table (Tr. 272-280). Beiting eventually got into the blackjack game and lost $23 in about 20 minutes (Tr. 280, 335, 337). Beiting returned on August 12, 1977, and had to assure petitioner Holt that he was not carrying a pistol before he was allowed to go upstairs (Tr. 281-282). About 200 people were present that night and blackjack and poker games

were in full swing, with petitioner Ahlbrand dealing poker (Tr. 282-284). Beiting bought a drink at the bar from petitioner Herthel and then was approached by petitioner Johnson. Johnson asked him, " 'What do you think of our place?' " (Tr. 282, 289). Johnson also said, " 'Naturally, we are going to have to run it as long as we can to make as much money as we can before we are going to be forced to shut it down for a while' " because "the heat is on" (Tr. 299). In addition, Johnson told Beiting that " 'we are going to start moving into some of the [night] clubs' " in the Newport area (Tr. 300).

Officer Groth visited the gambling establishment on September 21, 1977 and on October 15, 1977. On the first visit he was searched at the door by petitioner Holt. Once upstairs, Groth observed that there were about 50 people on the premises, that petitioner Herthel was tending bar, and that blackjack and poker games were in operation (Tr. 447-452). Groth played blackjack for about 30 minutes and lost $20 (Tr. 450-451). The second time, Groth arrived with Pamela Sellmeyer. Petitioner Holt again searched him, asked for identification and then led Groth and Sellmeyer to the second floor (Tr. 453-454, 553-554). Over 100 people were present and both blackjack and poker games were in progress (Tr. 458, 555-556, 593). This time, however, Groth played poker while Sellmeyer watched (Tr. 454, 556-558). Petitioners Ahlbrand and Johnson dealt for the house and Groth lost about $140 in an hour (Tr. 454-456). When Groth and Sellmeyer tried to leave at 4:30 a.m., co-defendant Vandetti asked them to wait a few minutes until a police car left the area (Tr. 457-458).

On October 25, 1977, the FBI searched petitioners' establishment pursuant to a warrant, and seized the poker and blackjack tables, a few dozen decks of playing cards, and a large quantity of liquor (Tr. 34-35, 41, 48, 50-51).

ARGUMENT

1. Petitioner Herthel contends (79-1873 Pet. 5-9) that the trial court erred in instructing the jury on the scope of 18 U.S.C. 1955, and that he could not properly be convicted of conducting a gambling business solely on the basis of his bartending activities.

The instruction in question is as follows (Tr. 902):

> The term "conduct" as it is used in connection with a gambling business means to knowingly perform any act, function or duty which is necessary to or helpful in the ordinary operation of the business. A person may be found to conduct a gambling business even though he is a mere servant or employee, having no part in the management or control of the business and no share in the profits. This includes all those who participated in the operation of the gambling business, regardless of how minor their roles are, and may include dealers, waitresses, doormen, maintenance people and other street-level employees and minor functionaries.

This instruction was correct. "The scope of section 1955 is broad and excludes only customers of the business." *United States* v. *Bourg*, 598 F. 2d 445, 448 n.6 (5th Cir. 1979). Accord, *United States* v. *Greco*, 619 F. 2d 635, 638-639 (7th Cir. 1980); *United States* v. *Avarello*, 592 F. 2d 1339, 1349 (5th Cir. 1979); *United States* v. *Rotchford*, 575 F. 2d 166, 174 (8th Cir. 1978); *United States* v. *Leon*, 534 F. 2d 667, 676 (6th Cir. 1976). As this Court observed in *Sanabria* v. *United States*, 437 U.S. 54, 70-71 n.26 (1978) (emphasis added), the statute "proscribes *any degree of participation* in an illegal gambling business, except participation as a mere bettor." Contrary to petitioner Herthel's claim, Section 1955 is not limited to persons who play "a necessary or integral" part in the

operation of a gambling business or who are "directly involved" in gambling. Rather, the statute reaches persons with "helpful," though minor, roles in a gambling business, including low-level employees such as watchmen, doormen, and cocktail waitresses. See, *e.g.*, *United States* v. *Avarello, supra,* 592 F. 2d at 1349; *United States* v. *Bennett,* 563 F. 2d 879, 883 (8th Cir.), cert. denied, 434 U.S. 924 (1977); *United States* v. *Leon, supra,* 534 F. 2d at 676; *United States* v. *Mattucci,* 502 F. 2d 883, 888 (6th Cir. 1974).[3]

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[3]Herthel's claim (79-1873 Pet. 8-10) that the construction of Section 1955 approved by the court of appeals is inconsistent with that accepted by other courts of appeals is baseless. To be sure, some of the cases cited by petitioner held that individuals having incidental contact with a gambling operation or contact amounting to patronization of the operation could not be said to have been participants in the business. See, *e.g.*, *United States* v. *Campion,* 560 F. 2d 751, 754 (6th Cir. 1977); *United States* v. *Leon, supra,* 534 F. 2d at 677; *United States* v. *Box,* 530 F. 2d 1258, 1267-1268 (5th Cir. 1976). But no case cited by petitioner conflicts with the settled principle that "the scope of the statute includes all those who participate in the operation of an illegal gambling business, except customers or mere bettors, regardless of how minor their roles." *United States* v. *Avarello, supra,* 592 F. 2d at 1349. And petitioner does not dispute the fact that he participated in the instant gambling business as a bartender.

Herthel's related contention (79-1873 Pet. 6-8) that the statute as construed below is unconstitutionally vague because persons having even the slightest, most indirect contact with a gambling business or its customers might meet the test of being " 'helpful * * * regardless of how minor [their] role' " lacks merit. As noted above, in order to fall within the ambit of the statute a person must have played a role in the gambling business; the statute does not reach non-participants.

By the same token, Herthel's claim (79-1873 Pet. 9) that the Due Process and Equal Protection Clauses are violated because mere bettors are exempt from prosecution under Section 1955, whereas he is not, is frivolous.

In view of the broad scope of Section 1955, petitioner Herthel's role in the instant gambling operation was more than sufficient to justify his conviction. Petitioner was actively engaged in tending bar on at least three of the four occasions the officers visited the establishment and it is fair to infer that he was not an occasional "substitute." Moreover, Herthel did not merely mix and sell drinks at the bar. He also mixed drinks for and helped supervise the cocktail waitresses who served players at the gambling tables (Tr. 125-126, 134-136, 223, 272, 282, 450). As an FBI gambling expert testified at trial, it is to the house's advantage to make it as convenient as possible for players to continue gambling without interruption (Tr. 405). Clearly, the bar service provided by Herthel and the waitresses he supervised contributed to creating an atmosphere conducive to the success of the gambling operation as a whole. See *United States* v. *Bennett, supra,* 563 F. 2d at 883.

2. Petitioner Ahlbrand's claim (79-6688 Pet. 4-6) that the evidence was insufficient to show that he was a poker dealer is belied by the testimony of Groth and Beiting who observed Ahlbrand dealing poker, "cutting the pot" and accepting tips from winning players (Tr. 274-277, 283, 454-456). The fact that other witnesses testified that they did not see Ahlbrand on the premises on other occasions and that Ahlbrand attacked Beiting's and Groth's credibility at trial raised questions of credibility which the jury resolved against petitioner.[4]

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[4]Ahlbrand's related claim (79-6688 Pet. 6-8) that the evidence failed to show that he was an "active participant" in the gambling operation in "concert" with the other defendants is also refuted by the record. "House dealers" have been held to fall within the ambit of Section 1955 (see *United States* v. *Harris,* 460 F. 2d 1041, 1049 (5th Cir.), cert. denied, 409 U.S. 877 (1972)), and the evidence against Ahlbrand amply established his status as such.

3. There is no merit to petitioner Holt's contention (79-6673 Pet. 3-5) that the trial court erred in admitting an FBI gambling expert's testimony regarding the customary manner in which blackjack is played and the meaning of "cutting the pot" in poker.

Expert testimony like that at issue here ordinarily is admissible in gambling trials to familiarize the jury with gambling jargon and the nature of the games involved. See, *e.g.*, *United States* v. *Scavo*, 593 F. 2d 837, 843-844 (8th Cir. 1979). Such testimony was admissible in this case since, as the trial court observed (Tr. 390, 393), some of the jurors had indicated their unfamiliarity with poker and blackjack. Moreover, the government had to establish not only that the games were being conducted, but also that they were being conducted as a business.

Nor could the jury have been unduly prejudiced by the expert's testimony about how games are typically played because, as Holt acknowledges (79-6673 Pet. 5; emphasis in original), the government "produced numerous witnesses" who testified about "how the *actual* games were played."[5]

4. Petitioner Johnson's claim (79-6674 Pet. 7-9) that he should have been granted a severance so that he could call his co-defendants as witnesses is insubstantial. A

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[5]Holt's reliance (79-6673 Pet. 5) on *United States* v. *Green*, 548 F. 2d 1261 (6th Cir. 1977) and *United States* v. *Anderson*, 584 F. 2d 849 (6th Cir. 1978) is misplaced. In *Green*, the defendants' convictions for conspiring to manufacture DMT, a controlled substance, were reversed because government experts had been allowed to testify about "extraneous, prejudicial" matters including DMT's "street value," its "evil properties," and its connection to a more notorious drug, LSD. 548 F. 2d at 1268-1270. Similarly, in *Anderson* the court relied upon *Green* to reverse defendants' conviction for conspiring to transport marijuana because a government expert testified "extensively" about the "wholly irrelevant" and "inordinately prejudicial" "evil" effects of marijuana and other drugs. 584 F. 2d at 851-852. Those cases are not remotely analogous to this one.

defendant is not entitled to a severance on that ground unless he or she makes a showing that a co-defendant would be willing to testify and that the testimony would be exculpatory. *United States* v. *Starr,* 584 F. 2d 235, 239 (8th Cir. 1978), cert. denied, 439 U.S. 1115 (1979); *United States* v. *Marable,* 574 F. 2d 224, 230-231 (5th Cir. 1978). Here, Johnson does not claim, and the record is devoid of any indication, that any of his co-defendants would have been willing to exculpate him at a separate trial. Accordingly, he fails to meet his burden of showing that the trial court abused its discretion in denying him a severance.

5. Petitioner Johnson also claims (79-6674 Pet. 8-9) that the examination of cocktail waitress Cathy Cole about her grand jury testimony violated his right to confrontation under *Bruton* v. *United States,* 391 U.S. 123, 124-126 (1968). Admission of Cole's prior grand jury testimony, however, could not have violated *Bruton* because she testified at trial as well (*United States* v. *Weinrich,* 586 F. 2d 481, 495-496 (5th Cir. 1978), cert. denied, 441 U.S. 927 (1979); *United States* v. *Parnell,* 581 F. 2d 1374, 1383 (10th Cir. 1978), cert. denied, 439 U.S. 1076 (1979)), and was extensively cross-examined about her grand jury testimony (Tr. 164-178, 183-184). Beyond this, the trial court admonished the jury (Tr. 143) that

> any statements that [Cole] or any other witness allegedly made before the Grand Jury is not substantive evidence upon which you can make conclusions that anybody was involved in an alleged gambling operation unless this or any other witness says that that is true and correct as he now recalls it. If a witness does not recall it or says that it's not true, then those previous statements made before a Grand Jury or made by any other person are to be used by

> you, if at all, only for purposes of impeaching that witness' testimony here; in other words, to contradict this particular witness or any other witness.

None of the petitioners challenged Cole's testimony on *Bruton* grounds at trial, objected to the instruction set out above, or requested any additional admonition regarding the use of prior statements.

6. Finally, petitioner Johnson (79-6674 Pet. 11-12) claims that he should have been granted a mistrial because the prosecutor "inflamed" the jury in his closing argument by alleging that Johnson had "intimidated or coerced" Cole into changing her testimony at trial.[6] This claim is insubstantial.

As the trial court correctly pointed out (Tr. 909-910), the prosecutor did not state that any witness had been intimidated, but "just remark[ed] about the fact that everybody [that is, Cole and two other witnesses] had forgotten what had happened" when they were called as witnesses at trial. Moreover, the prosecutor's remarks (Tr. 883, 890) were fair rebuttal to defense arguments (Tr. 809-811, 839, 875) concerning the "terrible time" the government had had when those witnesses' trial testimony did not confrom to their pretrial statements.[7]

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[6]Cole, who had worked as a cocktail waitress at petitioners' gambling establishment, was unable to describe the nature of that business in the same detail as she had in her appearance before the grand jury (Tr. 123). She acknowledged, however, that she had had drinks with petitioner Johnson and co-defendant Hesch the night before she testified at trial, and that they had discussed the trial (Tr. 109).

[7]Petitioner Johnson's other claims (79-6674 Pet. 9-11)—that the evidence did not establish that the gambling business was in "substantially continuous operation for a period in excess of thirty

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1980

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days" as required by 18 U.S.C. 1955 (b)(1)(iii), and that the trial court erred in its instructions on that element—lack merit.

A waitress testified that she worked at petitioners' gambling establishment for about a month (Tr. 129-132); one customer testified that he had been there 15 or 20 times in the fall and winter of 1977; another stated that she had been there 20 to 30 times during a one and one-half month period in the fall of that year (Tr. 206-208, 736, 739); Officer Klein's surveillance showed that the establishment was in operation from late July until early October (Tr. 618); and Officer Groth and investigator Beiting observed the gambling operation on a total of four different occasions in August, September and October 1977. This evidence was more than sufficient to meet the 30-days in operation requirement of the statute.

Johnson does not state the manner in which the court's instructions were improper, and his claim in that regard is unsupported by any authority.

DOJ-1980-08